

Present: Garvin and Dalton JJ.

1927.

MATHER v. PERI TAMBY CHETTY.

21—D. C. (Inty.) Colombo, 4,813

Summons—Action by way of summary procedure—Two defendants working in partnership—Personal service—Civil Procedure Code, ss. 55, 64, 705.

In an action by way of summary procedure on a liquid claim service of summons need not be personal.

Where such an action is brought against two defendants, carrying on business in partnership, summons may be served on one as agent of the other.

*Letchimanan v. Ramanathan Chetty*¹ overruled.

A PPEAL from an order of the District Judge of Colombo. The facts appear from the judgment.

Kulasingham, for appellants.

April 7, 1927. DALTON J.—

The plaintiff, the present appellant, sued the defendants, under the procedure laid down in Chapter LIII. of the Civil Procedure Code, to recover the sum of Rs. 2,821.33 due on promissory notes from the two defendants. Summons was issued and served upon the first defendant for himself, the summons against the second defendant being also served upon the first defendant as partner and agent of the second defendant. No application was made on behalf of either defendant for leave to appear and defend the action. When, however, in due course the plaintiff moved that judgment be entered against the defendants, the learned Judge in the Court below refused to allow the motion on the ground that there was no legal service of the summons on the second defendant. It does not appear that judgment was entered against the first defendant, but possibly plaintiff was not satisfied to take judgment against first defendant only.

The learned Judge based his decision upon the judgment in *Letchimanan v. Ramanathan Chetty*,¹ which he rightly points out is binding upon him, although he ventures to doubt that it is correct. It was decided in 1901, but in practice does not seem to have been consistently followed since then possibly because it was overlooked.

Plaintiff appeals from the decision dismissing his motion for judgment. Counsel urging that second defendant had been duly

¹ *L. Broune's Reports* 368.

1927. served, and that *Letchimanan v. Ramanathan Chetty* (*supra*) had
 DALTON J. been wrongly decided. There the Court (Bonser C.J. and
 Browne A.J.) held that service of summons under section 705 must
 Mather v. be personal, the reason for that conclusion being set out in the
 Peri Tamby judgment of Browne A.J.
 Chetty

Section 705 provides that when the plaintiff has obtained a summons and produces the instrument on which he sues "the Court may in its discretion make an order for the service on the defendant of the summons above mentioned." These words were stated to be very different from the less stringent requirements of the ordinary procedure, and sections 55 and 60 are mentioned. On reference to the provisions of section 55 I must admit, however, they seem to be not dissimilar to the provisions of section 705, save that the former are more precise. Section 55 referring to the summons directs that the Fiscal of the district "shall cause the same to be duly served on the defendant or on each defendant if more than one." Section 60 provides that service shall be personal wherever practicable, otherwise as the Court may direct. It was further pointed out that service "on the defendant" as required by section 705 was similar to the requirement for service in the Bills of Exchange Act, 1855. Reference to section 1 of that Act (18 & 19 Vict. c. 67) shows that plaintiff was required to file an affidavit of personal service. But it further goes on to show that personal service could be dispensed with, and this would seem to have been overlooked by Browne A.J., if the Court had given leave to proceed as provided by the Common Law Procedure Act, 1852. Section 17 of that latter Act (15 & 16 Vict. c. 76) provides, just as in the case of section 60 of our Code, that service of the writ of summons whenever it may be practicable, shall be personal, but the Court is empowered to order, where personal service cannot be effected, that plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as the Court might deem fit to make. No useful analogy therefore, it would be seen, can be drawn from the Bills of Exchange Act, 1855, to support the contention that under section 705 service must be personal, and by no other method. Further, there is nothing in English practice in proceedings under Order XIV. which supports, by way of comparison, any such construction of section 705. It is of interest in this latter connection to note that, prior to the Civil Procedure Code, 1889, the practice laid down under Ordinance No. 8 of 1856 in Ceylon in respect of claims for a debt or liquidated demand in money arising out of a contract express or implied, *e.g.*, on a promissory note, was almost similar to that under 18 & 19 Vict. c. 67 (see *Thompson's Institutes*, vol. I., p. 384-5). Personal service was not necessary if an order of the Court was obtained under section 1 of the Ordinance for service to be effected in some other way.

Counsel has not been able to cite any reported case in which the soundness of the decision in *Letchimanan v. Ramanathan Chetty* (*supra*) has been previously doubted, but there is no doubt that the Courts have in practice allowed substituted service in proceedings under Chapter LIII. This, of course, as the learned Judge in the Court below points out, is quite inconsistent with the interpretation placed upon section 705 by Browne A.J., for he holds that the manner in which a defendant in summary proceedings is to be brought into Court is strictly prescribed by section 705, which he holds requires personal service, and that manner is absolutely substituted for that given in Chapter VIII. It has further been pointed out that in the *Bank of Madras v. Ponnasamy*¹ the Court (Clarence and Dias JJ.) in proceedings under Chapter LIII. recognized that service upon a person other than the defendant was good service if the person upon whom service was effected was the defendant's recognized agent. That decision was, however, prior to 1901.

1927.
DALTON J.
Mather v.
Peri Tamby
Chetty

I regret I am unable to agree with the conclusion of the learned Judges in *Letchimanan v. Ramanathan Chetty* (*supra*) on this question. I am unable to see any such variation between the provisions of section 705 and section 55, which would in my opinion justify one in reading into section 705 after the words "service on the defendant" the word "personally." If that was intended, it seems to me it would have been so stated. In any case I am unable to see on what principle in one case any more stringent provisions for service should be required than in the other. What justice requires equally in every case is that the defendant should have notice, and I am unable to agree that the provisions of Chapter VIII. of the Code do not apply to summary proceedings under Chapter LIII.

In support of his motion for judgment plaintiff filed a certificate of the Registrar of Business Names showing that the defendants were registered as partners in the business. In view therefore of the provisions of section 64, service of the summons upon the first defendant, as agent for the second defendant, was good, the former being empowered as partner to accept service on his behalf.

I would, therefore, set aside the order of the trial Judge dismissing plaintiff's application for judgment and direct that judgment be entered for the plaintiff in the sum of Rs. 2,821.33, with interest as prayed, and costs. The decree will be drawn up in terms of this decision by the trial Judge.

GARVIN J.—I agree.

Appeal allowed.